

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-960

JAMES B. COLLINS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Petitioner, James B. Collins requests that this petition be filed and prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The opinion of the Court of Appeals was issued on November 16, 1978, and is attached at pages i to vi of the Appendix (hereinafter referred to as "App.").

JURISDICTION

The opinion of the Court of Appeals was filed November 16, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does Rule 11, Federal Rules of Criminal Procedure, require that before accepting a plea of nolo contendere, the judge inform the defendant of the elements of the offense?

2. Is there a compliance with Rule 11, Federal Rules of Criminal Procedure, when the trial judge accepts a nolo contendere plea without ascertaining that the defendant has read the information, and without personally informing the defendant of the essential element of intent to defraud?

3. Did the trial judge comply with Rule 11, Federal Rules of Criminal Procedure, before accepting the defendant's nolo contendere plea?

4. Was the defendant's nolo contendere plea voluntary?

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States

provides that,

"no person shall be...deprived of life, liberty, or property, without due process of law;..."

2. The Sixth Amendment to the Constitution of the United States provides that,

"In all criminal prosecutions, the accused shall enjoy the right to a ...trial, by an impartial jury... and to be informed of the nature and cause of the accusation..."

3. Rule 11 of the Federal Rules of Criminal Procedure provides that,

"(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the Court must address the defendant personally in open Court and inform him of, and determine that he understands, the following:

(1) The nature of the charge..."

"(d) Insuring That the Plea is Voluntary. The Court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open Court, determining that the plea is voluntary..."

STATEMENT OF THE CASE

Petitioner was charged by information with mail fraud. The charge was based on the deposit in New Mexico bank of insufficient funds checks drawn on a Texas bank. The petitioner was in business at the time and the checking was in the course of the operation of the business.

The waiver of indictment was on October 18, 1977, and the defendant pleaded nolo contendere on that date. He was sentenced on November 21, 1977, and was sentenced to a term of imprisonment. Thereafter, on December 22, 1977, he filed a motion to withdraw the plea. A hearing was held and the motion was denied. The petitioner appealed to the Court of Appeals for the Tenth Circuit, and in an opinion issued November 16, 1978, that Court affirmed. It is the affirmance which is the subject of this petition.

The petitioner alleged that he entered the nolo contendere plea without being aware that an intent to defraud is an essential element of the offense, and that he would not have entered the plea if he had known that such intent was an element.

The petitioner also alleged that at the time he entered the plea and until after being sentenced to imprisonment,

the petitioner understood that he would not be sentenced to imprisonment.

The trial judge made a finding that the petitioner was not made any promise that no imprisonment would be imposed, and that he was aware that imprisonment might be imposed.

The trial judge also made a finding that at the time of the plea the judge had adequately explained to the petitioner, that they were talking about a "scheme", that the information charged a scheme to defraud, that the petitioner was adequately advised of the general nature of the charge, and based on the petitioner's education and experience, the petitioner was fully apprised of the charges against him.

The Court of Appeals declined to disturb the findings regarding alleged promises of no imprisonment and alleged lack of understanding of the nature of the charge. The Appellate Court then held that Rule 11 does not require that the trial judge explain to the accused the elements of the offense charged.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The question involves a construction of Rule 11(c):

Does Rule 11(c) require that the trial Court inform the defendant of the elements of the offense? The Court of Appeals has ruled that it is not necessary for the trial judge to do so. This Court should decide the question whether the judge has to inform the defendant of the elements (e.g., intent to defraud, here) in order to inform the defendant of the nature of the charges.

The Court of Appeals has decided a federal question in a way that is in conflict with applicable decisions of this Court. The opinion does not square with this Court's decision in Henderson v. Morgan, 426 U. S. 637, 96 S.Ct. 2253, 49 L. Ed. 2d 108 (1976).

Here the Court of Appeals has approved a nolo contendere plea in a case in which the trial judge failed to determine that the accused had read the information or had it read to him, failed to inform the accused of the elements of the offense, and failed to determine that the defendant understood the elements of the offense. After the hearing at which the defendant claimed that he never knew that an intent to defraud was an essential element of the offense, the trial judge made a finding that the defendant was adequately advised of the general nature of the charge. The rule requires that the trial judge personally inform the

defendant of the nature of the charge. Rule 11(c), F.R.Cr.P.

The Court of Appeals has held here that an accused need not be informed of the nature of the charge, but that advice of the general nature will suffice. The Court has also held here that in informing the accused of the nature of the charge, the judge need not inform him of the essential element of intent to defraud.

The Court of Appeals has decided this case without full briefs, in an unpublished opinion, by a panel of three, and in reliance on the case of Sappington v. United States, 523 F.2d 858, 860 (8th Cir., 1975). The Sappington case is cited for the rule that in advising the accused of the nature of the charge, the judge need not advise the accused of the elements of the charge. The Court of Appeals does not discuss the point that the Sappington case was decided under old Rule 11, which did not require that the trial judge inform the defendant of the nature of the charge.

Old Rule 11 required the judge to address the defendant personally and determine that the plea was made voluntarily with understanding of the nature of the charge. Present Rule 11 (c) requires that the judge address the defendant in open Court and inform him of, and determine that he understands,

the nature of the charge. We submit that the trial judge here failed to comply with new Rule 11, and that the Court of Appeals has affirmed in reliance on one case, and that, a case which was decided under the old rule.

Rule 11 requires that the judge inquire into the defendant's understanding of the nature of the charge and the consequences of his plea. U. S. v. Cody, 438 F. 2d 287 (C.A. 8th, 1971); Bishop v. U. S., 349 F. 2d 220, 121 U. S. App. D.C. 243 (C. A. 1965); U. S. v. Berlin, 437 F. 2d 901 (C. A. 7th, 1971); McCarthy v. U. S., 394 U. S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); Henderson v. Morgan, supra.

It is undisputed that the petitioner had never seen the information to which he pleaded prior to his appearance in open Court on October 18, 1977. At the time of arraignment and upon reading the Information, the petitioner made objections to his attorney regarding the wording of the Information. According to the petitioner, his objection to the Information was: "...the use of the word 'scheme' or 'plan' or 'defraud'." The plea was entered in spite of this objection at the insistence of petitioner's counsel. Petitioner maintains, however, that this plea would never have been entered had he been apprised of the fact and had known that an intent to defraud was a necessary element of the crime of

mail fraud and that his plea was in effect an admission of that fact.

The Bench Book for United States District Judges (October, 1969) as cited in U. S. v. Cody, supra, recommends that the judge, if the defendant is pleading nolo contendere, "(1) ascertain and make finding that defendant: ...(d) is in fact guilty;" and that the judge should "(2) explain and ask defendant if he understand ...(f) the nature and essential elements of the charge to which he is pleading;" and further, that the judge should ask the defendant, "(d) just what he did (obtain admission of necessary acts, knowledge, and intent.)"

A review of the arraignment of petitioner on October 18, 1977, reveals that the Court never specifically informed the petitioner that there was a necessary intent to defraud.

The petitioner denied any intent to defraud from the outset and maintained that even in his remarks to the Court at the time of sentencing. The petitioner stated to the Court: "Nothing was planned, there was no scheme." "...There was no personal gain, there was no scheme involved, there was no planning whatsoever. I don't think I was capable of that."

Similar comments, but even stronger, were made by Appellant's attorney at the time of sentencing: "...Mr. Collins

did not set upon a scheme to defraud anybody or sit up one night and decide this is what I'm going to do. ...He found himself in the situation that he had unwittingly or unintentionally gotten into..."

In this case, the petitioner pleaded nolo contendere to a nonexistent crime. He, in effect, admitted to issuing checks upon an account that had insufficient funds to satisfy those checks. He believed this to be a crime even though an essential element of the crime to which he pleaded is an intent to defraud. Any intent to defraud was denied by the petitioner and his attorney from the outset and continuously during the investigation that led to his being charged with mail fraud and his entering a plea of nolo contendere.

The case of McCarthy v. U.S., supra, presents facts and circumstances strikingly similar to this case. The defendant was charged with tax evasion, entered a plea of guilty, and after being sentenced sought to have his plea set aside. The defendant contended that the Court failed to determine that the plea was voluntary with an understanding of the nature of the charge and the consequences of the plea.

Curiously enough, the Court pointed out that defendant and his attorney, at the time of sentencing, characterized the defendant's actions as inadvertent,

neglectful and committed without any disposition to deprive the government of its due.

The Court also points out on page 425 that the judge must satisfy himself that there is a factual basis for the plea in order to "...protect a defendant who is in a position of pleading voluntarily with an understanding of the nature of a charge, but without realizing that his conduct doesn't actually fall within the charge." Federal Rules of Criminal Procedure 11, Notes of Advisory Committee on Criminal Rules.

CONCLUSION

There is only one possibility more repugnant to our basic concept of justice in criminal law than an innocent person being convicted of a crime by the Court or a jury, and that is the possibility of an innocent person being permitted to plead guilty or nolo contendere to a crime that does not exist.

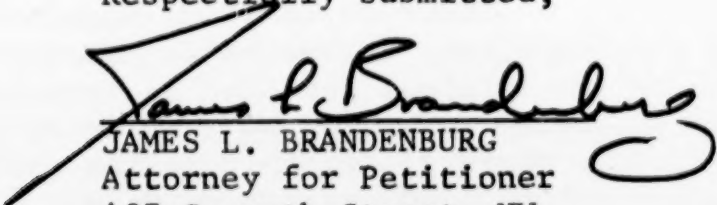
What possible excuse or justification can there be for tenaciously clinging to a plea when the record so convincingly suggests the petitioner did not understand the charge? The petitioner says "I am innocent" and asks only for an opportunity to say it to a jury. Deprivation of the right to a jury trial should be based upon more convincing and substantial proof of guilt with an

admission of guilt.

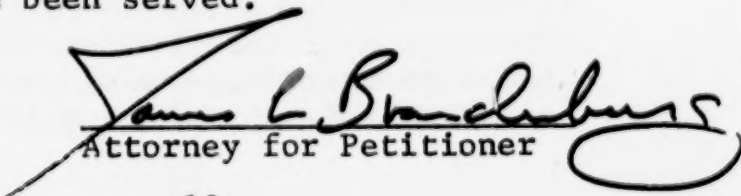
The petitioner was not given adequate notice of the offense to which he entered his plea and it was, therefore, involuntary under the principles set forth by the authorities recited above.

Petitioner, therefore, respectfully requests that this Court grant this petition, consider the transcript of the plea and sentencing and the hearing on the motion to withdraw the plea, and that the cause be reversed and the petitioner be allowed to withdraw his plea and stand jury trial.

Respectfully submitted,


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I hereby certify that on this _____ day of December, 1978, a copy of the foregoing petition for certiorari was mailed to the Solicitor General, Department of Justice, Washington, D. C. 20530. All parties required to be served have been served.


Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NO. 78-1093

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES B. COLLINS,

Defendant-Appellant.

OPINION

Appellant Collins pleaded nolo contendere to violation of 18 U.S.C. § 1341 (mail fraud), on October 18, 1977. Sentence to eighteen months imprisonment was imposed November 21, 1977. On December 22, 1977, Collins submitted to the District Court a motion pursuant to Rule 32(d), Fed. R. Crim. P., to withdraw the plea of nolo contendere. On January 6, 1978, the District Court conducted a hearing on the Rule 32(d) motion, at which counsel for Collins presented evidence and argument relating to two basic contentions: 1) Collins was under the impression before entering his nolo plea that an agreement had been reached that he would serve no time in jail; and 2)

the District Court failed to comply with Rule 11, Fed. R. Crim. P., to the extent Collins was inadequately informed regarding the plea (this contention appears limited to one that Collins was unaware that "intent to defraud" was an element of the offense charged).

Testimony presented at the hearing consisted of that of Collins himself, the attorney who represented him at the time he entered the nolo contendere plea, and friends whom he had discussed his plea with prior to actually entering it. At the conclusion of the hearing the District Court made oral findings of fact and conclusions of law that: Collins was not promised that a sentence to confinement would not be imposed; he was fully aware that such a sentence could be imposed; no threat was made to coerce Collins into entering the nolo plea; to the extent Collins may have been contending that he was misled by counsel regarding the consequences of the nolo plea, the evidence relating to the claim was neither credible nor creditable; to the extent Collins claimed to have been unaware that "intent to defraud" was an element of the offense charged, at the time of accepting the plea the Court adequately explained to Collins that they were talking about a "scheme" he had; the information charged the scheme to defraud; Collins was adequately advised of the general nature of the charge; and, given the fact that Collins

was a college graduate and experienced businessman, he was fully apprised as to the charges against him. Based on these findings the District Court denied the Rule 32(d) motion.

We begin our review in this appeal from the premise that a Rule 32(d) to withdraw a nolo contendere plea, submitted after sentencing, will be granted only "to correct manifest injustice." Grant of the motion is within the sound discretion of the trial Court. *Barker v. United States*, 579 F.2d 1219, 1223 (10th Cir. 1978). See also, *United States v. Feltman*, 451 F. 2d 153, 154 (10th Cir. 1971), cert. denied, 405 U. S. 996. In bringing this appeal counsel for Collins advances three arguments to support a showing of manifest injustice: 1) the trial judge failed to comply with Rule 11, Fed. R. Crim. P., in that he failed to satisfy himself that a factual basis existed for the plea (this contention apparently is limited to whether a factual basis was established regarding the element of "intent to defraud" of the offense charged); 2) Collins was under the belief that, if he entered a nolo contendere plea, he would not be committed to prison; and 3) Collins, his attorney, and the trial judge were under the impression that simple "check kiting" was a crime in itself (this point apparently is made in support of the argument that the District Court failed to establish a factual basis for

Collins' intent to defraud).

Collins' belief that a jail sentence would not be imposed. Set forth above are the district court's findings of fact which specifically bear on this point. Those findings are supported by the record and will not be disturbed in this appeal. We accordingly find no basis for grant of the Rule 32(d) motion on this ground.

Complaints relating to Rule 11.

Counsel's remaining two arguments center around the requirements of Rule 11. The primary question involved here is whether Collins understood that "intent to defraud" was an element of the offense he was charged with committing. Rule 11 includes no requirement that a district court, prior to accepting a plea of nolo contendere, establish a factual basis for the plea. See, North Carolina v. Alford, 400 U. S. 25, 36 (1970); United States v. Prince, 533 F. 2d 205, 208 (5th Cir. 1976); United States v. Clark, 429 F. Supp. 89, 92 (W. D. Okla. 1976). Nor does Rule 11 require that the court explain to the accused the elements of the offense charged. Sappington v. United States, 468 F. 2d 1378, 1380 (8th Cir. 1972), cert. denied, 411 U. S. 970. See also, Sappington v. United States, 523 F. 2d 858, 860 (8th Cir. 1975). In pleading nolo contendere, a criminal defendant is not admitting guilt. He is, however, waiving his right to trial and authorizing the court, for

purposes of the case, to treat him as if he were guilty. North Carolina v. Alford, supra at 35. A guilty plea ". . . is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." Id. at 37. Counsel has thus established no violation of Rule 11 to the extent he is arguing that the district court failed to establish a factual basis for the plea and to explain the elements of the offense.

As to the alleged misapprehension of Collins, his attorney, and the trial judge that simple "check kiting" is a crime, the district court's findings regarding the "scheme to defraud", which as already stated are supported by the record, bear specifically on this point and will not be disturbed in this appeal.

When this appeal was docketed the parties were notified that it was to be considered on the record of proceedings before the district court and without oral argument. Each has submitted a memorandum which we have thoroughly reviewed along with the files and records of the district court. Based on this review we have reached the conclusions set forth above. The district court's judgment denying the Rule 32(d) motion

to permit withdrawal of the nolo contende-
re plea is accordingly affirmed.

Affirmed. The mandate shall issue
forthwith.